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Trial Transcript, Vol. 19, Afternoon Session

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File 126
4377
Box 10

case # 4993

File # 126

4377

1 IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
2 WASHAKIE COUNTY, STATE OF WYOMING
3

4 IN RE:)

5 THE GENERAL ADJUDICATION)
6 OF RIGHTS TO USE WATER)
7 IN THE BIG HORN RIVER)
8 SYSTEM AND ALL OTHER)
9 SOURCES, STATE OF)
10 WYOMING.)

Civil No. 4993

FILED

3/17 1981

Margaret V. Hayton CLERK
DEPUTY

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14
15 VOLUME 19

16 Afternoon Session

17 Monday, March 9, 1981
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ORIGINAL

1 THE SPECIAL MASTER: All right. Let's please
2 come to order. Mr. Echohawk?

3 (Document was handed to the
4 (witness and to the Special
Master.)

5 THE SPECIAL MASTER: I thank you for that.
6 You are calling this 55B, not 55A?

7 MR. ECHOHAWK: 55B because it's a new
8 exhibit, a changed exhibit.

9 Q. (By Mr. Echohawk) Mr. Billstein, I hand you what
10 has been marked as Exhibit 55B. Would you please
11 identify that?

12 A. This is a table identified as Table 2, "Acres
13 in Use by Photo." It shows three columns:
14 Exhibit No., corresponding aerial photograph for
15 that exhibit number and corresponding acres in
16 use relative to the same exhibit number.

17 The table includes similar information from
18 Exhibits 56 through 136 and shows a total of
19 34,850 acres.

20 Q. Do you have a copy of C-55A over there also,
21 Mr. Billstein?

22 A. Yes, I do.

23 Q. Would you briefly check and see if 55B is the
24 same as 55A except for the exhibit number column?

25 billstein - direct - echohawk

1

(Brief pause.

2

A. They are the same. However, they contain the same error on one of the columns.

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Q. (By Mr. Echohawk) Please correct the error, whatever it is.

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A. This would be on Exhibit 55B. Exhibit No. 131, instead of HR-284, it should be H4-284, and the corresponding change should be made on 55A for the exhibit between H4-280 and H5-264. That should be H4-284.

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Q. Thank you. In all other respects are 55A and 55B acreage totals the same?

12

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A. Yes.

14

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Q. Mr. Billstein, I show you what has been marked as United States Exhibit WRIR C-139. Would you please identify that exhibit?

17

A. Yes, this is a copy of my resume.

18

Q. Does it accurately reflect your qualifications?

19

A. Yes.

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Q. Mr. Billstein, earlier today we had some discussion as to the amount of participation that you had in the historic lands program or the identification of the lands that are in current use. You spoke of a field program -- or field review by yourself;

billstein - direct - echohawk

1 is that correct?

2 A. I participated in a field review.

3 Q. During that field review that you had, did you
4 visit each parcel that is being claimed as historic
5 lands in use that fall outside what is called the
6 Federal Irrigation Projects?

7 A. I reviewed every tract of land in the non-project
8 area land base plus those in the LeClair Irrigation
9 District.

10 Q. And how was that review conducted again?

11 A. I utilized the services of the two primary field
12 investigators, Mr. Saunders and Mr. Johnston. We
13 took their notebooks and hydrographic copies and
14 reviewed those areas by means of helicopter over
15 a full three-day period.

16 Q. So then you visited every tract and confirmed that
17 the land had been irrigated?

18 A. I reviewed their findings and I accepted their
19 conclusions.

20 THE SPECIAL MASTER: He did visit every
21 tract though? Is that your question?

22 Did you visit every tract?

23 MR. ECHOHAWK: That's correct.

24 THE WITNESS: We visited every tract.

25 billstein - direct - echohawk

1 THE SPECIAL MASTER: How many tracts were
2 there in total?

3 THE WITNESS: Hundreds. I don't know
4 exactly.

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billstein - direct - echohawk

1 Q (By Mr. Echohawk) In regards to the lands that
2 are called project lands, what type of review
3 did you yourself have as to determine whether
4 or not those lands were irrigated or had been
5 irrigated?

6 A As I previously testified to, the first mapping
7 of irrigation for the Wind River Federal
8 Irrigation Project took place in the fall of
9 1978. In the spring of 1979 Mr. Waples, who
10 is the principal investigator for that project,
11 and I met with the representatives of the
12 Bureau of Indian Affairs who run the projects,
13 and reviewed the findings of Mr. Waples versus
14 the official records of that project.

15 Q What type of records would those be that you
16 reviewed?

17 A Those are the records of the ditchriders.
18 Basically the head of the ditchrider, Mr. Twichel
19 went over each service area on a tract by tract
20 basis from his personal knowledge. If he was
21 confused or uncertain, he consulted ditchrider
22 records.

23 Q Water resource planning, would that be a common
24 way for you as a civil engineer to assess whether

25 billstein-direct-echohawk

1 lands had been irrigated or not?

2 A Certainly it's the standard way of doing it.
3 Certainly an individual does not have the time
4 when you're putting together a master plan to
5 do every single increment himself. He hires
6 competent people to do field work. His job is
7 to conduct a review process that confirms in his
8 mind that the information presented to him is
9 accurate.

10 MR. ECHOHAWK: Your Honor, at this time I
11 would like to offer into evidence, I'll read
12 them by exhibit number and description of
13 exhibit. Exhibit 55-B, which is the Table 2
14 showing exhibit number, aerial photograph and
15 acres in use. I will withdraw Exhibit 55-A.

16 MR. WHITE: No objection, Your Honor, to
17 the withdrawal of 55-A.

18 THE SPECIAL MASTER: Oh, I thought you
19 meant to the admission.

20 MR. WHITE: No, I'm sorry.

21 MR. ECHOHAWK: Exhibit 55, which is the
22 study area map; Exhibit 56, which is the aerial
23 photograph 7-209; Exhibit 57, which is the aerial
24 photograph 7-312; Exhibit 58, which is the

25 billstein-direct-echohawk

1 aerial photograph 8-180.

2 THE SPECIAL MASTER: If you wish, Mr.
3 Echohawk, we can follow those in exact sequence,
4 the ones you just read through, all those
5 offered on the front pages of both Exhibit C-55-B
6 through and including 136, 137 and 138, the
7 booklet. It would save you an awful lot of reading.

8 MR. ECHOHAWK: Okay.

9 THE SPECIAL MASTER: Would that be all right?

10 MR. WHITE: That's fine with us.

11 MR. ECHOHAWK: Thank you. I appreciate
12 that.

13 THE SPECIAL MASTER: You bet. And do you
14 wish to voir dire the materials?

15 MR. WHITE: Yes.

16 MR. ECHOHAWK: Do I understand Exhibit --
17 Just to clear it up, 137 is offered, which is
18 the summary table, which is over on the easel;
19 138 is the report, and 139, which is the resume.

20 THE SPECIAL MASTER: Right. I believe that
21 the essence of many of these exhibits is contained
22 in 138.

23 THE WITNESS: That's right, Your Honor.

24 THE SPECIAL MASTER: All right. Mr. White,

25 billstein-direct-echohawk

1 you may voir dire the witness.

2 MR. WHITE: Your Honor, could I inquire
3 the purpose for which they're being offered?
4 Are they being offered for the truth of their
5 contents as opposed to illustrative purposes?

6 THE SPECIAL MASTER: They're offered for
7 whatever probative value they may have.

8 MR. ECHOHAWK: For the truth of their
9 contents.

10 MR. WHITE: Could I have about five minutes?
11 I need to reshuffle these and it will make the
12 voir dire go a lot faster.

13 THE SPECIAL MASTER: We'll take the time you
14 need for preparation unless you want to take a
15 straight ten minute break.

16 MR. WHITE: A straight ten minute break will
17 be fine.

18 THE SPECIAL MASTER: All right, a straight
19 ten or fifteen minute break we'll have.

20 MR. WHITE: Why don't we go back on the
21 record.

22 MR. ECHOHAWK: In my offer of Exhibits, 56
23 through 136, I would offer them at this point
24 only for the areas that are delineated in blue.

25 billstein-direct-echohawk

1 There are other areas that are delineated in
2 green that other experts will testify about,
3 so the foundation has not been laid for those
4 specifically. I would like to offer these only
5 for the blue areas that indicate unadjudicated
6 lands in use.

7 THE SPECIAL MASTER: Well, the figure 34,850,
8 which is a key figure this morning is also the
9 figure of the blue areas only, is it not?

10 MR. ECHOHAWK: That's correct.

11 MR. WHITE: I assume the offer is of the
12 photographs as well as the overlays, but for the
13 overlay, it excludes the red and green areas; is
14 that correct?

15 I have no objection to the bifurcating offer.

16 THE SPECIAL MASTER: Fine. Good catch.

17 Okay. Mr. White, take your fifteen minutes.

18 (Thereupon a ten minute
19 recess was taken.)
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25 billstein-direct-echohawk

1 THE SPECIAL MASTER: We will now come to order.

2 Okay, Mr. White, are you ready to proceed?

3 MR. WHITE: Yes.

4 Your Honor, as a preliminary matter, the
5 State would voice its objection to the admission
6 of the photographic exhibits 56 through 136 in
7 that there was no foundation that would establish
8 that they accurately illustrated what they purportedly
9 to represent.

10 The question was asked and I moved to strike.
11 The answer was stricken, and I think that I ought
12 to make it clear from the beginning that our position
13 is there is no such foundation.

14 However, anticipating the Court's understandable
15 tendency to let anything in for what it may be worth,
16 I would like to proceed to deal with the question,
17 among others, of accuracy.

18 THE SPECIAL MASTER: Very well.

19 VOIR DIRE EXAMINATION

20 BY MR. WHITE:

21 Q. Mr. Billstein, with respect to Exhibit C-56 through
22 136, and specifically the underlying aerial photographs,
23 how do you know that they accurately represent, if
24 they do, what they purport to illustrate?

25 billstein - voir dire - white

1 A Those photographs that form the base maps for the
2 exhibits were developed at the same scale as the
3 hydrographic field maps which reflected the
4 conclusions of the study.

5 Therefore, the overlays which were made from
6 the field maps as shown over those base maps
7 accurately reflect the conclusions.

8 Q I must have misasked the question. I asked about
9 the underlying photographs, not the overlay.

10 How do you know that the underlying photographs
11 accurately illustrate what they purport to represent?

12 A The underlying photographs are blank copies of
13 photographs. The overlays depict the results as
14 defined by our hydrographic work aerials.

15 Q Is it true then that you do not know whether the
16 underlying photographs accurately represent what
17 they purport to depict?

18 A They accurately represent that.

19 Q How do you know that?

20 A They are one and the same photograph as the
21 hydrographic work photographed and therefore,
22 the use as defined on that photograph should match
23 the results defined on the hydrographic aerial.

24 Q I'm talking about the base photograph, the unannotated
25 billstein - voir dire - white

1 photograph that you got from Horizons. How
2 do you know that that accurately portrays what
3 it purports to depict?

4 A. The aerals were a set of three, so they do match
5 the aerial photograph group that we ordered en
6 masse from Horizons. Therefore, the scale of
7 that map should reflect the same scale as the maps
8 that we used for our field work.

9 The field work map was in a relatively rough
10 state after the year of use. Therefore, it was
11 reasonable to use a base map at the same scale with
12 overlays extracted from the hydrographic copy to
13 adequately depict the use.

14 Q Was the photograph that's mounted on Exhibit 56 or
15 Exhibits 56 through 136 -- were those photographs
16 that are actually mounted there the ones you got
17 from Horizons?

18 A. That's right.

19 Q You didn't make a copy to come up with this
20 particular photograph; is that correct?

21 A. Absolutely not.

22 Q So you got those from Horizon?

23 A. That's right, a set of three.

24 Q Now, what made you feel that the photographs you got
25 billstein - voir dire - white

1 from Horizon were accurate?

2 A. Okay. We asked that the photographs be individual
3 scale rectified to a scale of one inch equal
4 a thousand feet.

5 By that, we asked that they undertake a
6 rectification process in their lab to delineate
7 for the areas of our interest, which was basically
8 those areas of historic irrigation that we had
9 defined for them to be rectified to that scale.

10 Q. Isn't it true that Horizon made no rectification
11 for tilt?

12 A. Those photographs were reviewed by Horizons for
13 tilt or drag. The method that we used was that
14 we furnished quadrangles to Horizons, and they
15 did what is known as a quadrangle rectification
16 process, or a linear line rectification process,
17 so they took actual points from quadrangles and
18 rectified the aerial photographs so that the scale
19 relationship between quadrangle and photograph were
20 one and the same.

21 Q. Do you know whether or not they made a rectification
22 of these photographs for tilt?

23 THE SPECIAL MASTER: I think he answered the
24 question as best he could, Mr. White, in his last
25 billstein - voir dire - white

1 answer.

2 Q (By Mr. White) Is it true then that the only
3 rectification done by Horizons was to match the
4 scale of the photographs against USGS quad sheets?

5 A. They were asked to do linear rectification with
6 quad sheets as a basis.

7 Q. Isn't it true that when you do rectification
8 with quad sheets you cannot rectify for tilt?

9 A. I'm not familiar with the process.

10 Q. Okay. I hand you a book entitled, "Photogrammetry"
11 by Francis H. Moffitt, professor of civil
12 engineering, University of California, published
13 by International Textbook Company, Scranton,
14 Pennsylvania, and I refer you to pages 70 and 71
15 and ask you whether or not that refreshes your
16 recollection?

17 A. This particular --

18 MR. ECHOHAWK: Your Honor, I believe before
19 Mr. White can cross-examine Mr. Billstein regarding
20 this book, he has to establish through Mr. Billstein
21 that that is a standard textbook relied upon by the
22 people in this field.

23 THE SPECIAL MASTER: Well, he's not cross-
24 examining him on the book. He's asking him --

25 billstein - voir dire- white

1 MR. ECHOHAWK: He's asking him what was
2 contained in the book.

3 THE SPECIAL MASTER: Well, I will overrule
4 for now.

5 MR. WHITE: If Mr. Billstein doesn't know the
6 process, then we have another objection for lack
7 of foundation.

8 THE SPECIAL MASTER: Overruled.

9 MR. ROGERS: The book doesn't establish --
10 the man that wrote the book has not been established
11 as any sort of an expert in this case.

12 THE SPECIAL MASTER: Miss Reporter, what
13 was the question that Mr. White asked of the
14 witness?

15 (Thereupon the last question
16 (was read back as follows:
17 ("Q. Okay. I hand you a book
18 (entitled, "Photogrammetry" by
19 (Francis H. Moffitt, professor
20 (of civil engineering, University
21 (of California, published by
22 (International Textbook Company,
23 (Scranton, Pennsylvania, and I
24 (refer you to pages 70 and 71
25 (and ask you whether or not that
(refreshes your recollection?")

* * * * *

billstein - voir dire - white

1 THE SPECIAL MASTER: The objections are
2 overruled.

3 Does that refresh your recollection?

4 THE WITNESS: Yes.

5 Q (By Mr. White) I hand you what's been marked
6 for identification as Plaintiff's Exhibit WRIR
7 HB-5 and ask you to compare that with pages 70
8 and 71 of the photogrammetry book, and determine
9 whether or not that accurately sets forth the
10 contents of those pages?

11 A They appear to be one and the same.

12 Q Beginning at the top of page 70 and carrying
13 over to the page 71 is the sentence that begins
14 with the word "In" on the bottom of page 70 and
15 on top of page 71 "In order to determine the
16 scale of a particular point".

17 A Yes.

18 Q Isn't it true in order to rectify any tilt in
19 the graph, you must know the elevation of a
20 point at which you seek to determine the scale?

21 A That's correct.

22 Q How did Horizon determine the elevation of the
23 points of these photographs where it determined
24 the scale to be 1 to 5,000?

25 billstein-voir dire-white

1 A I'm not familiar with how they would do that.

2 Q How did Horizon determine the position on the
3 photograph of that point with respect to both
4 the accuracies of the tilt and the principal
5 line as defined in the test?

6 A When I was investigating the lab and sent our
7 person down, Horizon's explained to this
8 individual that they had what is known as a
9 tilt table, and that this tilt table was
10 utilized in their scale rectification process
11 such that the linear measurements that we
12 defined by the series of lines that we depicted
13 on a quadrangle for them to measure from were
14 in fact correct from their photographs, so we
15 would have a rectified print.

16 The actual process itself I did not participate
17 in the review of. This is a licensed government
18 contractor, and if they had the mechanical
19 apparatus to handle a scale rectification from
20 tilt or crab then it is my understanding that
21 that was what was going to take place.

22 Q Do you know of your personal knowledge whether
23 or not Horizon used the tilt table?

24 A Yes.

25 billstein-voir dire-white

1 Q Do you know of your own personal knowledge
2 that they did use the tilt table for the
3 rectification work on these photographs?

4 A Only I should rephrase that in terms of Mr.
5 Saunders was my representative to Horizon's
6 Incorporated. He made telephone calls to this
7 contractor and he talked to the man in the lab and
8 the man in the lab described that he was in fact
9 using the tilt table to arrive at the scale
10 rectified prints.

11 Q Isn't it true that if the tilt table were not
12 used that would adversely affect the reliability
13 of any scale of these photographs?

14 A It depends if there was tilt in the photographs.

15 Q How did you determine which photographs, if any,
16 had tilt which would require a tilt rectification?

17 A That was not a determination of mine. We paid
18 four individuals, scale rectified photographs
19 utilizing the expertise of that company to
20 furnish those. We made the necessary checks with
21 our own people to enable us to feel comfortable
22 that they were in fact carrying out procedures
23 to give us the proper rectifying prints. It was
24 not necessary for me to understand the entire

25 billstein-voir dire-white

1 process to feel secure that they were giving
2 me a product that was rectified.

3 Q Wasn't it true that you were concerned enough
4 about the rectification to undertake your own
5 verification work?

6 A That's true in terms of scale.

7 Q I hand you what's been marked for identification
8 as WRIR HB-1 and ask if you can identify that?

9 A Yes. This was a series of random checks for
10 scale accuracy that Mr. Saunders of our company
11 undertook to review the overall accuracy of the
12 photographs in the area of study.

13 Q Did you make any verification of the rectification
14 on US Exhibit C-56?

15 A No.

16 Q C-57?

17 A No.

18 Q C-58?

19 A No.

20 Q C-59?

21 A No.

22 Q C-66?

23 A No.

24 Q C-67?

25 billstein-voir dire-white

1 A No.

2 Q C-71?

3 A No.

4 Q C-74?

5 A No.

6 MR. ECHOHAWK: Your Honor, I'd like to
7 object. The exhibit speaks for itself. The
8 particular aerial photographs were checked,
9 they're listed on the exhibit.

10 MR. WHITE: It doesn't include the exhibit
11 number, Your Honor.

12 THE SPECIAL MASTER: The objection is
13 overruled. We'll proceed with the voir dire.
14 Q (By Mr. White) Did I ask you about 74, Ron?
15 If I didn't, I'll ask you again. Did you, in
16 your verification work, include C-74?

17 A No.

18 Q C-75?

19 A No.

20 Q C-76?

21 A No.

22 Q C-79?

23 A No.

24 Q C-81?

25 billstein-voir dire-white

1 A Nope.

2 Q C-82?

3 A No.

4 Q C-83?

5 A No.

6 Q C-86?

7 A No.

8 Q C-87-A?

9 MR. WHITE: I think the offer ought to be
10 amended to include 87-A. Did you mean 87 or 87-A?
11 It's got 87-A at the bottom.

12 MR. ECHOHAWK: It should have been just 87.

13 THE SPECIAL MASTER: You want to amend that
14 now?

15 MR. ECHOHAWK: Yes, Your Honor.

16 THE SPECIAL MASTER: All right. It's
17 ordered. Just strike the A from it, why don't
18 you, to comply.

19 MR. WHITE: Can I just put a line through
20 the A?

21 MR. ECHOHAWK: Yes. Thank you.

22 Q (By Mr. White) Okay. C-87?

23 A No.

24 Q C-88?

25 billstein-voir dire-white

1 A Yes.

2 Q It did, okay.

3 C-91?

4 A Nope.

5 Q C-92?

6 A No.

7 Q Yes?

8 A No.

9 Q Ninety-four?

10 A Nope.

11 Q Ninety-five?

12 MR. WHITE: It's got an A. Do you want to
13 do the same thing with 95-A?

14 MR. ECHOHAWK: Yes.

15 MR. WHITE: I'll just put an X across the
16 bottom.

17 Q (By Mr. White) Ninety-five?

18 A No.

19 Q I'm sorry, I didn't hear you.

20 A No.

21 Q No for 95.

22 Ninety-eight?

23 A No.

24 Q Ninety-nine?

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- 1 A No.
- 2 Q One hundred?
- 3 A No.
- 4 Q One hundred two?
- 5 A No.
- 6 Q One hundred three?
- 7 A No.
- 8 Q One hundred four?
- 9 A No.
- 10 Q One hundred five?
- 11 A No.
- 12 Q One hundred seven?
- 13 A No.
- 14 Q One hundred eight?
- 15 A No.
- 16 Q One hundred nine??
- 17 A No.
- 18 Q One hundred eleven?
- 19 MR. WHITE: And may I strike the A again?
- 20 MR. ECHOHAWK: Yes.
- 21 THE WITNESS: No.
- 22 Q (By Mr. White) One hundred twelve?
- 23 A No.
- 24 Q One hundred thirteen?
- 25 billstein-voir dire-white

1 A No.

2 Q One hundred fifteen?

3 A No.

4 Q One hundred sixteen?

5 A No.

6 Q One hundred eighteen?

7 A No.

8 Q One hundred twenty?

9 A No.

10 Q One hundred twenty-one?

11 A No.

12 Q One hundred twenty-two?

13 MR. WHITE: May I strike A?

14 MR. ECHOHAWK: Yes, thank you.

15 THE WITNESS: No.

16 Q (By Mr. White) One hundred twenty-three?

17 MR. WHITE: May I strike A?

18 MR. ECHOHAWK: Yes, thank you.

19 THE WITNESS: No.

20 Q (By Mr. White) One hundred twenty-four?

21 A No.

22 Q One hundred twenty-six?

23 MR. WHITE: May I strike the A?

24 MR. ECHOHAWK: Yes.

25 billstein-voir dire-white

1 THE WITNESS: No.

2 Q (By Mr. White) One hundred twenty-seven?

3 A No.

4 Q One hundred twenty-eight?

5 A No.

6 Q One hundred twenty-nine?

7 A No.

8 Q One hundred thirty?

9 MR. WHITE: May I strike the A?

10 MR. ECHOHAWK: Yes, thank you.

11 THE WITNESS: No.

12 Q (By Mr. White) One hundred thirty-one?

13 A No.

14 Q One hundred thirty-three?

15 MR. WHITE: May I strike the A?

16 MR. ECHOHAWK: Yes, thank you.

17 THE WITNESS: No.

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25 billstein-voir dire- white

1 Q (By Mr. White) 134?

2 A No.

3 Q 135, and may I strike the A?

4 A (By Mr. Echohawk) Yes.

5 A (By the Witness) No.

6 Q (By Mr. White) 136 A? May I strike the A?

7 A (By Mr. Echohawk) Yes.

8 A (By the Witness) No.

9 THE SPECIAL MASTER: Mr. White, let me have a
10 look at 136 before you put it back. That has one acre on
11 it. That's an unbelievable -- I don't even see --

12 MR. WHITE: Right there (indicating). It is shown
13 on the eastern edge right there at the point --

14 THE SPECIAL MASTER: All right. Thank you.

15 A (By the Witness) The answer was no, that there were
16 no points on Billstein's deposition exhibit 102, plaintiffs'
17 exhibit HB-1. There were, however, checks carried out by
18 Mr. Saunders of our office. Any time a photo came in he
19 would locate points on that photo and do a check between a
20 series of points to try to ascertain whether that particular
21 photo was in an acceptable accuracy.

22 These were unrecorded, but they took place, and
23 this was the standard procedure.

24 We received a flight strip. In many cases before
25 billstein-voir dire-white

1 the sectionizing was complete, he would select a couple
2 of known locations, do a linear distance measure of those,
3 and then compare those against the quad, and this was a
4 quick way of doing a spot scale check. This particular
5 exhibit was done on a random sample, which we felt would
6 give us a representative group set of the total study area,
7 and it accomplished that purpose.

8 Q Well, you did make one of your random tests on Exhibit 132,
9 didn't you?

10 A Yes.

11 Q Didn't you check the boundaries of Section 5?

12 A One of the boundary areas for Section 5 --

13 Q Which boundary did you check?

14 A I can't tell from this tabulation. Let me check my hydro-
15 graphic copy.

16 (Pause.

17 A (By the Witness) I can't see right now the second set of
18 section lines that would have been involved.

19 These photographs had hydrographic work performed
20 on them for basically a half a year after we received them,
21 and it would not be uncommon to have a section line erased
22 and not put back in in the process of putting the conclu-
23 sions on irrigation use and the delineations of the acreage
24 associated with that use.

25 billstein-voir dire-white

1 Q Well, isn't it true that the south boundary of Section 5
2 as shown on Exhibit 132 runs in a southeast direction and
3 it's roughly six inches long?

4 A Let me check my ownership map.

5 We are in a situation where we are transitioning
6 from the Wind River Meridian into the State Meridian and
7 it's a transitional section.

8 Q Let me ask you a preparatory question and then you are
9 welcome to answer back, but would you point out to me and
10 the Court where the corners of Section 5 are as you have
11 established them on Exhibit 132?

12 A Let me refer to some backup sources.

13 (Pause.

14 Q (By Mr. White) Mr. Billstein, let me ask you first, with-
15 out referring to anything else, can you tell me where the
16 section corners of Section 5 are located on Exhibit 132?
17 Then you can refer to anything you would like.

18 (Pause

19 A (By the Witness) The section corner markings are not shown
20 clearly on the exhibit, so right now, unless I can check
21 with my backup set of data, I couldn't give you the exact
22 location of the entire section.

23 Q Okay. Well, let's go ahead and check the backup data.

24 THE SPECIAL MASTER: While you are there, Mr.

25 billstein-voir dire-white

1 Billstein, can you give me the exact location of the 39
2 acres that you claim are by historic use in that area?
3 Is that identified on the map?

4 THE WITNESS: Yes, it is. It's shown in two
5 separate pieces in blue (indicating).

6 THE SPECIAL MASTER: Two pieces and not three?

7 THE WITNESS: That's right. This says out, Your
8 Honor.

9 Q (By Mr. White) Mr. Billstein, is one of those portions in
10 Section 5 and the other in Section 3?

11 A That's correct.

12 Q How do you know that this particular tract of land is located
13 in Section 5 (indicating)?

14 A Just that the section number usually is placed in the center
15 of the section, and that area is located directly north of
16 the 5 designation.

17 Q But isn't it true that without referring to other documents
18 you cannot indicate to the Court where the corners of
19 Section 5 are located?

20 THE SPECIAL MASTER: I think the question has been
21 asked and answered.

22 Q (By Mr. White) Why don't you look at the other material?

23 THE SPECIAL MASTER: We may take our seats,
24 gentlemen.

(END)

25 billstein-voir dire-white

1 THE SPECIAL MASTER: Mr. Billstein, would
2 you like to take five or ten minutes on this?

3 THE WITNESS: We better, Your Honor. We
4 can't seem to find the ownership plats that
5 are adjacent to this area, and also I'm trying
6 to find the seven and one-half minute quads
7 that I brought with me and those don't seem to
8 be here.

9 THE SPECIAL MASTER: We'll take a ten
10 minute recess. It's about time for one. It's
11 nearly three o'clock, I promised one.

12 (Thereupon a ten minute
13 recess was taken.)

14 THE SPECIAL MASTER: All right. Ladies
15 and gentlemen, we'll come to order.

16 Q (By Mr. White) Okay. Mr. Billstein, having
17 referred to other material which I wish you'd
18 please identify for the Court, are you able to
19 indicate whether or not the corners for Section 5
20 are correctly set forth on Exhibit 132?

21 A I refer to the hydrographic copy that we performed
22 the sectionizing work on originally, and it has
23 the same indentation number, 179-264, and
24 I also reviewed the location of that section line
25 billstein-voir dire-white

1 on the seven and one-half minute quad called
2 Arapahoe Ranch quadrangle, and the section
3 corner that you're inquiring about is the section
4 line which is identified as the east section line
5 or between these two points in Section 5.

6 Q What about the south section line that I asked
7 you about before?

8 A The --

9 Q The one that runs about six inches long and runs
10 from the NW to the SE.

11 A Okay. Now that I've had a chance to look at
12 the quadrangle, we can see that the area north
13 in Section 5 is the area in the Wind River -- I
14 mean the State Meridian System, and that transition
15 as you cross Owl Creek to the Wind River Meridian.

16 Therefore we are dealing with two separate legal
17 grid systems.

18 Q So the southern boundary of Section 5 does appear
19 correctly as a slant?

20 A No.

21 Q No?

22 A Not at all.

23 Q Where's the southwest corner of Section 5?

24 A Section 5 runs out at Owl Creek. It intersects
25 billstein-voir dire-white

1 Owl Creek, so therefore it conforms with the
2 Owl Creek itself. It's not a standard square
3 section.

4 Q So the section line runs, the south section line
5 runs from west until it hits Owl Creek and then
6 follows Owl Creek?

7 THE SPECIAL MASTER: I might --

8 THE WITNESS: That's correct.

9 Q (By Mr. White) Okay.

10 A Did you perform the measurement on that line?

11 Q No because I'm not sure where it ends.

12 This line right here, you want me to
13 measure that one?

14 THE SPECIAL MASTER: Gentlemen, I'm not
15 sure any of this has much application to either
16 the accuracy of that exhibit or to the subject
17 matter of the blue lands to which it was
18 admitted or for purposes which it is to be
19 admitted.

20 Q (By Mr. White) So that Section is 5.3, that
21 section line which you measured is 5.3 inches
22 long?

23 A I assume your measurement is correct. We showed
24 5.28 or .20 inches difference.

25 billstein-voir dire-white

1 Q Did you determine where the section corners
2 were actually located?

3 A Well, we have our own sectionizing procedures
4 at HKM. Basically it involves linear transfer
5 with proportional dividers. What you do is go to
6 a set of base information such as a quadrangle
7 and you locate a section... We can see on the
8 quadrangle the small red criss-cross, that that
9 is a found section as defined by the USGS.
10 Therefore, what you do is you use a proportional
11 divider technique to locate that sectional line
12 from identifiable points, first of all on the
13 quadrangle, then on the aerial photograph itself.
14 Those points might be breaks in streams, they
15 might be breaks in the road, and you work on both
16 sides of the section line and find the north,
17 south, east, west lines and iterate through a
18 series of two or three points until you've got a
19 line which is accurate, basically to a width of
20 a line of 30 or 50 feet.

21 Q Isn't it true then that your section corners
22 are based on the section corners shown in the
23 USGS quad sheets, the one to 24,000 quad sheets
24 and not based on any investigation as to the
25 billstein-voir dire-white

1 actual location of those corners in the field?

2 A You don't locate -- For a survey of this nature
3 you don't locate section corners in the field.
4 You've got an identifiable section on a USGS
5 quad, they recognize its been found. You use
6 physical characteristics of the area to work
7 backwards to that section corner.

8 Q So the answer is you did not find these section
9 corner monuments in the field; is that correct?

10 A That's correct.

11 Q Let's take a look at another one, US Exhibit C-61.
12 Did you perform your random check on C-61?

13 A Yes.

14 Q What section line did you measure?

15 A One of the section lines associated with Section 11.
16 If you let me refer to my basic material.

17 Q Okay.

18 THE SPECIAL MASTER: Off the record.

19 (Off-the-record discussion.

20 THE WITNESS: That particular section line
21 is along the southern boundary of Section 11.
22 You want to measure that?

23 Q (By Mr. White) Well, let me ask you this, whether
24 or not you located the western edge of that line
25 billstein-voir dire-white

1 off the USGS quad sheet?

2 A Yes, its been located.

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1 Q (By Mr. White) You say the marker itself has been
2 located?

3 A The marker? No, we located --

4 Q You located it off the quad sheets; is that correct?

5 A That's correct.

6 Q Isn't it true that, if you know, that particular section
7 corner has never been established?

8 THE SPECIAL MASTER: Well, assuming it has never
9 been established and the marker has never been put in place,
10 does that make any difference to our proceedings?

11 MR. WHITE: It makes a big difference, Your
12 Honor, and the reason for this is that the witness testified
13 that the areas which showed up on the two tables, Table 1
14 and Table 2, and I think it's Exhibit 558 and 137 -- I'm
15 not sure -- were planimetered, as the witness testified,
16 off these photographs and if the photographs aren't accu-
17 rately to scale, then the planimeter result is suspect, and
18 that's what I'm trying to find from this investigation.

19 THE SPECIAL MASTER: I wouldn't say suspect, but
20 it might have a deviation or a correction factor, as we say
21 in aviation, but I would hardly say it's suspect.

22 MR. WHITE: Okay.

23 A (By the Witness) What appears though to have happened in
24 this case, counselor, is, you see, there's a grid of section
25 billstein-voir dire-white

1 lines all the way around Section 14. We find the westerly
2 section corner, the northwesterly section corner dividing
3 Sections 10 and 11, so approximately one, two, three, four
4 known points were available to assist in locating this
5 intermediate point. We've got a north-south line. We
6 have got a east-west line.

7 Q (By Mr. White) Isn't it true that the values, acreage
8 values, which you have assigned to the areas over-lain in
9 blue on Exhibits 56 through 136 were developed by plan-
10 imetering the boundaries of the areas shown on the over-
11 lays?

12 A The planimètering took place on the boundaries defined on
13 the hydrographic copies. The overlays were traced from
14 the hydrographic copies and should be accurate reflections
15 on the same area, but the actual acreages were determined
16 from the hydrographic copies.

17 Q Do the overlays accurately reflect the boundaries shown
18 on the hydrographic copies?

19 A We spent considerable time reviewing that. I believe they
20 do.

21 Q What length did you determine would be established or should
22 be assigned to the southern boundary of Section 11 on
23 Exhibit C-61?

24 A The length is the measured length and it's 5.18 inches.

25 billstein-voir dire-white

1 Q Isn't it true that you assumed that all section lines
2 were 5,280 feet long?

3 A No.

4 Q No? How did you determine the length of the particular
5 section line in Section 11 which you used to check?

6 A My instructions for our people were to select sections for
7 their particular studies or those particular section
8 lines that we wanted to use in our scale accuracy checks
9 from those that we felt were standard sections.

10 Now, I said no, because there are other sections that
11 were not checked and showing up in this exhibit that
12 certainly have more than 5,280 acres --

13 Q Feet.

14 A This particular section line, the investigator must have
15 felt comfortable with its location using the other four
16 points of control, so that he went ahead and took a measure-
17 ment on it.

18 Q I hand you what has been marked for identification as HB-3.

19 THE SPECIAL MASTER: 5,280 feet.

20 MR. WHITE: You said acres.

21 THE WITNESS: I'm sorry. Feet.

22 THE SPECIAL MASTER: What is this, Mr. White?

23 MR. WHITE: I'm going to tell the witness, Your

24 Honor.

25 billstein-voir dire-white

1 Q (By Mr. White) I have handed this to you, and I'm going
2 to tell you that it's a certified record from the Cheyenne
3 Land Office of the Bureau of Land Management, Township 5
4 North, 5 West, and ask you whether or not you can find the
5 southwest corner of Section 11 on that plat?

6 A That particular corner is shown within the Wind River flood
7 plane.

8 Q It's shown in the river, isn't it?

9 A I don't believe the river is probably at its natural stage
10 as anything of that size, but I would guess that what they
11 mapped here was the flood plain.

12 Q I hand you what's been marked for identification as HB-7,
13 and tell you that is a copy of the field notes for that
14 particular township, from the same office and ask you
15 whether or not, based on the field notes, it appears that
16 that section was never closed?

17 (Pause.

18 Q (By Mr. White) Mr. Billstein, would it refresh your re-
19 collection if I told you that the index diagram on printed
20 page 748 gives you a key to the page upon which the surveyor's
21 notes appear and that the number nineteen, hand written
22 nineteen, appears in the southern boundary of Section 11?

23 A Okay. Thank you.

24 MR. PERRY: Your Honor?

25 billstein-voir dire-white

1 THE SPECIAL MASTER: Yes.

2 MR. PERRY: Your Honor, I would object to the
3 use of this. We have no indication here that this is a
4 certified copy or that in any other way it's been authenti-
5 cated.

6 MR. WHITE: Well, I will make the representation
7 to the Court that it was obtained from the BLM Office and
8 expect the same sort of reciprocation from the tribes that
9 I gave based on their representations.

10 THE SPECIAL MASTER: I would object unless used
11 for some other purpose than it is now, which is just to
12 voir dire the exhibit. If it's to be used to be introduced
13 in evidence, I would require some tracing as to its source.

14 MR. WHITE: I would say that there's a Copywork
15 or Certification Order on the front, Your Honor, which may
16 not be legible on your copy, but I would be glad to show it
17 to you in the original.

18 THE SPECIAL MASTER: That's all right. I have
19 ruled on it.

20 A (By the Witness) The note on Page 19 reflects that they did
21 not close the corner due to physical problems in the Basin
22 of the Wind River.

23 Again it appears this point is bisected in both
24 directions by non-section corners. The sectionizer must

25 billstein-voir dire-white

1 have located the southwestern boundary by utilizing those
2 points.

3 Q (By Mr. White) Isn't it true that you assumed that the
4 actual length of that section line was 5,280 feet?

5 A In that the four corners that bisected this point measure
6 out on the quads as two times 5,280 feet, it was probably
7 assumed that it was a standard section.

8 Q I direct your attention to what has been marked for identi-
9 fication as US Exhibit C-131, specifically Section 15, and
10 you can wander up here if you would like, with the permis-
11 sion of the Court, to see that.

12 THE SPECIAL MASTER: That's fine. What was that---
13 C Exhibit 131?

14 MR. WHITE: C Exhibit 131, Your Honor, and I'm
15 referring to Section 15.

16 Q (By Mr. White) Isn't it true that, as shown on Exhibit 131,
17 Section 15 is rhombus?

18 A That's correct. Those section corners are not in a straight
19 line.

20 Q Isn't it true that the north, south -- excuse me -- eastern
21 boundary and the western boundary of Section 15 is approxi-
22 mately 4900 feet long?

23 A Well, I should measure it, I suppose.

24 (Pause.

25 billstein-voir dire-white

1 A (By the Witness) That's correct.

2 Q (By Mr. White) What adjustment, if any, or what factor did
3 you use in your planimetering with respect to the lands in
4 and around Section 15? For example, those in Section 14.

5 A In mountainous terrain it's not unusual to have section
6 corners which don't line up. There is a vertical displace-
7 ment, I imagine due to rough terrain. There are going to be
8 a few sections distributed throughout the study area base
9 that have this problem.

10 The rectification process that we utilized was based
11 on setting the scale on the most extensive irrigated area
12 on each photograph, so as you get into changes in relief
13 away from that photograph, you are undoubtedly going to get
14 into changes in scale or distance between section corners.

15 That was the whole purpose of this random check, to
16 show that, yes, we had variances of 96.9 percent to 103.8
17 percent on sections such as these, and based on these random
18 checks, that they seemed to counter-balance each other so
19 that the total acreage that we have presented in a plain
20 should be essentially the true acreage.

21 * * * * *

1 Q (By Mr. White) Mr. Billstein, what adjustment
2 did you make in your planimetering work with
3 respect to the blue parcel in Section 14 to
4 reflect elevated terrain?

5 A There's no adjustment in the planimeter readings.
6 We did not go to each individual section and
7 perform that kind of task. We're talking about
8 10,000 or so individual planimeter readings as
9 a part of this evidentiary material. You start
10 changing your settings for each one of the
11 tracts on an individual section basis and you're
12 looking at literally additional man months of
13 time. We felt that the random check gave us
14 sufficient confidence with the counter-balancing
15 affects on the photographs and it was reasonable
16 to use a constant planimeter setting. This is
17 an extreme case.

18 Q How did you make your -- that your random checks
19 reflected the distribution of elevation variations
20 based on terrain that you would encounter in your
21 planimeter work?

22 A The instructions I gave Mr. Saunders was that he
23 was to utilize acreage, I mean section lines in
24 exhibits with a whole range of topographic

25 billstein-voir dire-white

1 conditions that we were to encounter on a
2 Reservation. He was not to prejudice his
3 readings by just utilizing the river valleys
4 along the Big Wind or Little Wind. He was to
5 get up into the high country, the Crow Creek
6 area, Dry Pasup Creek area and such, and if he
7 felt that he had established a sample that was
8 reasonable or a reasonable cross-section of the
9 entire study area base, then he would stop his
10 analysis there, do his total and report to me
11 on his conclusion.

12 His conclusion was that they counter
13 balanced and on a total acreage basis, that it
14 was reasonable to use a common setting.

15 Q What specific sample did he use which was
16 similar to the situation that we described or
17 discussed here on Exhibit 131, if you know?

18 A We have a lot of high country on this exhibit,
19 but I don't know specifically what he would
20 have used to approximate those conditions. But
21 we're looking at Crow Creek, Dry Pasup Creek,
22 Sage Creek, Trout Creek, Muddy Creek, a lot of
23 the high mountain watersheds.

24 Q Did you personally determine that the random
25 billstein-voir dire-white

1 sample used by Mr. Saunders accurately reflected
2 the distribution of aerial variation throughout
3 these photographs or did you leave that up to
4 him?

5 A That was basically left up to him. We talked
6 about it, I gave him instructions as to what I
7 wanted. Again, he spent four, five years carrying
8 out the general adjudication in the Powder River
9 Basin for the State of Montana. He had expertise
10 in sectionizing and evaluating acreage associated
11 with sectionizing, certainly reasonable to let
12 him make a sample determination for me.

13 Q Is it true that you made no personal investigation
14 to insure that your instructions were carried
15 out with respect to the random sampling?

16 A I simply looked at the list, saw that it contained
17 high country lands, valley lands, intermediate
18 terrain lands, felt it was reasonable.

19 Q Okay. Mr. Billstein, I direct your attention
20 to the Exhibit C-64, and I'd like to ask you
21 about the manner of calculation of the acreages
22 shown here in blue. Are you able to tell the
23 Court the number of acres included as currently
24 irrigated in the parcel of land that is located

25 billstein-voir dire-white

1 in the -- roughly the SE 1/4 of the SE 1/4 of
2 Section 30 and the NE 1/4 of the NE 1/4 of
3 Section 31?

4 A I could go to my hydrographic copies and be able
5 to tell Your Honor very quickly.

6 Q Okay. Please do so.

7 (Brief pause.

8 Q How many acres is that?

9 A This is 30 acres.

10 Q In the southern end of that acreage there's a
11 large white rectangle area to which my untrained
12 eye would look like a building. Do you know
13 what that is?

14 A One thing I should point out, Counselor, is
15 that we do have a -- there's a break where this
16 particular edging should have been cut out to
17 reflect the farmsteads in the area. It is shown
18 on the hydrographic copy and was not included
19 in the planimeter tables. That white tract of
20 land I personally don't know what it is, being
21 the farmstead just above it, and that use area
22 was excluded.

23 THE SPECIAL MASTER: Do you know that use
24 area was excluded?

25 billstein-voir dire-white

1 THE WITNESS: From the planimeter readings,
2 yes, sir, I checked it out over the weekend.

3 Q (By Mr. White) It was included in the Exhibit,
4 64, was it not?

5 THE SPECIAL MASTER: But he just said he
6 got it from the hydrographic map in his hand and
7 not the exhibit.

8 MR. WHITE: What I'm trying to make, I'm
9 not trying to trap him, I'm trying to make a
10 point that these may not necessarily reflect what's
11 on his hydrographic exhibit.

12 THE WITNESS: This is a two-acre tract. But
13 my point, Your Honor, is that we've got someone
14 who's been out in the field who's made a block
15 around the farmstead road area. The instructions
16 were to alleviate any physical obstacles they
17 saw; highway, major road, canals, farmsteads.
18 My tendency is to believe it's part of the farm
19 system as mapped. It could be where they're
20 storing hay, whatever, and that the individual
21 in the field made his delineation of what the
22 physical obstacles were and that was not one of
23 them.

24 Q (By Mr. White) It was not?

25 billstein-voir dire-white

1 A The white area?

2 Q The white area.

3 A It was not one of them.

4 THE SPECIAL MASTER: Not one of what?

5 THE WITNESS: Was not one of the physical
6 obstacles excluded from the acreage totals.

7 THE SPECIAL MASTER: It was not excluded?

8 THE WITNESS: It was.

9 THE SPECIAL MASTER: That's precisely why I
10 wanted to get that straight.

11 Q (By Mr. White) So the white area was excluded.
12 How about the roads leading into it?

13 A That's not correct. The road area was excluded,
14 the white area was not excluded, which my point
15 is that the areas where the roads and farmstead
16 are located are marked out, they were excluded.
17 The other tract that shows in white is included.

18 Q What was the tract in white?

19 A I don't know.

20 Q Over in the West 1/2 of Section 30 there is
21 another tract of land that's located apparently
22 in the West 1/2 of the SW 1/4. How many acres
23 did you list for that tract of land?

24 A Approximately 30 acres.

25 billstein-voir dire-white

1 Q And you see the large white areas, to the
2 uninitiated eye would look like a stack yard.

3 A Like a stockyard?

4 Q A stack yard.

5 A There's a white area there.

6 Q Was that included or excluded?

7 A That was included.

8 Q What was the basis for its inclusion, based on
9 your personal field inspection of these areas?

10 A I did not do a personal field inspection of
11 this area.

12 Q That was something I wasn't sure about. In your
13 direct examination did you or did you not personally
14 visit each of these areas?

15 A The private ditch systems, not the Wind River
16 Federal Irrigation Project.

17 Q You also visited the LeClair Project, did you not?

18 A That's right.

19 Q So what was the basis for your opinion that that
20 white area had been historically irrigated?

21 A Let me dig out a few more sources.

22 (Brief pause.

23 A I'm looking at a map which is the official
24 assessment records of the Wind River Federal
25 billstein-voir dire-white

1 Irrigation Project.

2 THE SPECIAL MASTER: Can you tell from your
3 document about how many acres that first white
4 improvement may have covered or how many acres
5 of stack field may have been required?

6 THE WITNESS: We're talking a couple, two
7 to three acres.

8 THE SPECIAL MASTER: Each?

9 THE WITNESS: Each. What this map shows is
10 that that tract of land referred to as stack
11 field by Counsel is in fact presently assessable
12 land. The particular photo that I have in my
13 hand does not show a stack field, that this may
14 be a short term type of improvement or there
15 could be a variety of reasons for the location
16 of that. The problem you get with looking at
17 pictorial coverage, Your Honor, is that it only
18 gives you a view of what is taking place at that
19 particular point in time. That's where the
20 field work and the interviews with the ditchriders
21 and such other people come in.

22 Q (By Mr. White) Now, isn't it true, Mr. Billstein,
23 that on the assessment record you showed me,
24 your assessment photograph, the area that I've

25 billstein-voir dire-white

1 described as the stack yard is excluded, the
2 Roman Numeral III?

3 A No, that's an edge, Counsellor. That would just
4 be this very inside edge associated with a little
5 access road that comes in there. The rest of
6 that extends down into the major assessable field.
7 These people are paying money to get water
8 delivered to that.

9 Q What's the date of this particular photograph
10 that you're referring to?

11 A This is approximately a '54 photograph, but the
12 office of Bureau of Indian Affairs feels that
13 it's an accurate representation of the
14 assessability conditions on the project at this
15 time and when our people met with them, including
16 myself in June of 1979, they pointed out to us
17 any changes they had in their assessment records
18 that were different than on their respective
19 maps.

20 They have large scale, approximately twice
21 this size, eight inch to the mile maps and have
22 the same type of information, so we could easily
23 cross check.

24 THE SPECIAL MASTER: When you refer to
25 billstein-voir dire-white

1 assessment records, they are assessment records,
2 records of assessment taken from the office of
3 the Bureau of Indian Affairs at Fort Washakie?

4 THE WITNESS: That's correct, Your Honor.

5 Q (By Mr.. White) Mr. Billstein, over in the --
6 running along the common boundary of Sections
7 34 and 3, on Exhibit 64, do you find a long sort
8 of arrowhead shaped tract that must have about 40
9 acres in it or so?

10 A I see the tract you're referring to.

11 (Brief pause.

12 Q Can you find that on your hydrographic aerial
13 photograph?

14 A Yes.

15 Q How many acres does that include?

16 A Approximately 39 acres.

17 Q Isn't it true that on the underlying photograph
18 for Exhibit C-64 that's covered with trees?

19 A No.

20 Q What are those objects that are on the underlying
21 photograph if they're not trees?

22 A Well, we can see some very good looking laterals
23 through the upper tract into the road.

24 Q What are the objects on there that are small
25 billstein-voir dire-white

1 circular dark objects?

2 A Well, I have a clearer print, and it's just
3 relative to the darkness of vegetation, could
4 be they have some, a little bit of hummocky
5 land, so --

6 THE SPECIAL MASTER: A little bit of what
7 kind of land?

8 THE WITNESS: Hummocky, rolling.

9 THE SPECIAL MASTER: How do you spell it?

10 THE WITNESS: H-U-M-M-O-C-K-Y. Let me check
11 the assessment records on that tract. My work
12 map shows that it's all presently assessable.
13 Let me confirm that with the maps.

14 (Brief pause.

15 THE WITNESS: That tract is shown as one
16 that is presently assessable, people are paying
17 operation and maintenance on it to have water
18 delivered to it.

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1 Q (By Mr. White) Well, then, what are those objects on
2 the photograph, if the photograph is an accurate repre-
3 sentation?

4 MR. ECHOHAWK: Your Honor, I believe he's already
5 explained that.

6 THE SPECIAL MASTER: I would concur in that.
7 Mr. White, why don't we take a little break? We would all
8 welcome it for ten minutes, ten to fifteen-minute recess.

9 (Thereupon a recess was taken.

10 THE SPECIAL MASTER: All right. We are back on
11 the record. Mr. White?

12 MR. WHITE: I think we have got a pending question.
13 Well, let's go to the next parcel.

14 Q (By Mr. White) I direct your attention to a parcel in
15 blue. It appears to be in the southwest of the northwest
16 of Section 3 on Exhibit C-64, and ask you the basis upon
17 which you determined that that, what I guess is about 30
18 acres, was irrigated?

19 (Pause.

20 MR. PERRY: Excuse me, Your Honor. Could I suggest
21 that we put the exhibits on the easel?

22 THE SPECIAL MASTER: Well, we were going to do that
23 an hour ago, but --

24 MR. WHITE: That's the last parcel I'm going to
25 billstein-voir dire-white

1 ask about, Your Honor.

2 THE SPECIAL MASTER: Why don't we lift the one
3 and --

4 MR. WHITE: This will fit over it, I think.

5 MR. PERRY: Thank you.

6 THE SPECIAL MASTER: If we had our own courtroom,
7 we would have pointers and easels and lights and things
8 like this, but this lawsuit is wherever we find a courtroom
9 available.

10 THE WITNESS: Okay. I'm ready.

11 A (By the Witness) This particular tract is served by lateral
12 32-A from the Wind River A Canal, direct service. It is
13 shown to be assessable under the official records.

14 My field people did visit the area and confirmed that
15 that use was taking place as --

16 Q (By Mr. White) Take a look at Exhibit 64, Mr. Billstein,
17 and isn't it true that there are either ravines or streams
18 with very heavy vegetation running through that parcel?

19 A There's an intermixture of heavy vegetation with lighter
20 colored vegetation as shown on the base photo. Again, that
21 could be accounted for from a number of reasons.

22 Q Well, not how it could be, but what was the basis for your
23 opinion in light of that stratification or the verification
24 in vegetation on the photograph?

25 billstein-voir dire-white

1 A My opinion was based on the fact that, first of all, my
2 field people visited the area and mapped it such.

3 Secondly, that we have a direct lateral to the
4 exact tract that we are evaluating.

5 And, thirdly, that it shows on the official assessment
6 maps that it's receiving water and paying O and M charges
7 on the land.

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1 Q (By Mr. White) Did you include the entire acreage
2 within the boundaries shown as being currently
3 irrigated?

4 A Yes, we did. That entire area is paying O and M
5 costs.

6 Q So your opinion is that the entire area is
7 currently irrigated?

8 A That's correct.

9 THE SPECIAL MASTER: And the entire area of
10 acreage would be included in your acreage total
11 for that exhibit?

12 THE WITNESS: That's correct.

13 THE SPECIAL MASTER: The 1,700 and some
14 acres, 1,712 acres? That's right, I'm pretty sure
15 that's right.

16 THE WITNESS: Whatever the acreage is
17 associated with "9" 159.

18 Q When your people went out to the field and
19 looked at those areas, did they type the areas
20 or did they treat them as all one type of
21 irrigation?

22 A They evaluated the areas by type.

23 Q I hand you what's been marked as HB-8, and ask
24 you if that sets forth the types which your
25 billstein-voir dire-white

1 field investigators assigned to the lands which
2 they visited?

3 A That's correct.

4 Q Directing your attention to Exhibit 137, can
5 you tell us on that exhibit how many of the
6 34,850 acres are Type VI lands, lands irrigated
7 sporadically or very irregularly?

8 A I have a series of summary tables. I would
9 have to assess those summary tables to get that
10 information. In this particular instance, it's
11 not important. What we're doing here is mapping
12 the land that is receiving water, and my
13 conclusions are relative to the acreage that's
14 receiving water.

15 THE SPECIAL MASTER: Yes, but I believe his
16 question was important or I would not have
17 permitted it to be asked, and I think it is
18 important what percentage of 34,850 would you put
19 in Type VI, was it?

20 MR. WHITE: Yes, sir.

21 THE SPECIAL MASTER: Classification, or do
22 you know? If you don't, just say I don't know.
23 If that was not a part of your work, then just
24 say so.

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1 THE WITNESS: For this program it was not
2 a part of my work.

3 Q (By Mr. White) Is it true that the 34,850 acres
4 included Type VII, idle lands?

5 A That's incorrect.

6 Q Does it exclude Type VII?

7 A Yes.

8 Q Does it include Type VIII and Type IX which are
9 not on Exhibit HB-8?

10 A It does not include -- Well, I guess on Types
11 VIII and IX haven't been introduced so --

12 Q Okay. Is it true then with respect to Types I, II,
13 III, IV, VI -- excuse me, V and VI off of HB-8,
14 you're unable to tell the Court the breakdown
15 between those types of the 34,850 acres?

16 A I have a summary table that the information is
17 contained in. If it was meaningful to the Court,
18 it's very important to you, I can spend the
19 night or sometime this week and we could develop
20 that information.

21 MR. WHITE: Well, Your Honor, at some point
22 we're going to come to the water requirement for
23 those acres which will be very significant
24 depending on what type they're in, and I think

25 billstein-voir dire-white

1 it would be an appropriate area in which to have
2 some evidence.

3 THE SPECIAL MASTER: I think so too. Mr.
4 Billstein, I'm not trying to badger you, and
5 we're not trying to make this a daily ordeal of
6 witnesses, but this is the first witness that
7 hasn't been sick on the stand and I commend you
8 for that. And I don't want to get you sick, it's
9 been a long day on the stand and if you're getting
10 tired say so. I don't want to have people
11 dragging around like poor Mr. Kersich for the
12 last three or four days or the poor fellow with
13 his throat, Mr. Page, the time before. But I
14 do think it's important to get some understanding
15 of this acreage because it's vital to know if
16 this is all Type V and Type VI, that's one very
17 important fact, and if it generally falls in a
18 particular percentage of category, that ought to
19 be in evidence, and if you don't present it, I'm
20 going to ask you when I call you as my witness
21 when we get through.

22 THE WITNESS: Could I make a couple of
23 comments?

24 THE SPECIAL MASTER: Sure.

25 billstein-voir dire-white

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2 some evidence.

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12 last three or four days or the poor fellow with
13 his throat, Mr. Page, the time before. But I
14 do think it's important to get some understanding
15 of this acreage because it's vital to know if
16 this is all Type V and Type VI, that's one very
17 important fact, and if it generally falls in a
18 particular percentage of category, that ought to
19 be in evidence, and if you don't present it, I'm
20 going to ask you when I call you as my witness
21 when we get through.

22 THE WITNESS: Could I make a couple of
23 comments?

24 THE SPECIAL MASTER: Sure.

25 billstein-voir dire-white

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1 THE WITNESS: The typing that shows up on
2 our hydrographic copies reflect the current
3 condition of the land base. That's not to imply
4 that certain lands that are in IV or VI with
5 the proper amendments could not be brought back
6 into full service irrigation.

7 THE SPECIAL MASTER: Okay. That's what I
8 wanted to know. What you're saying is a Type III
9 meadow irrigation, when you look at this this
10 year it could possibly be a Class 1 irrigable
11 land if the test that follow in the testing to
12 see if it has drainage and other requirements and
13 sandy loam would justify it, is that what you're
14 saying, is that you got type meaning one thing,
15 that's totally distinguished from class of land
16 for irrigation meaning another, and one is apples
17 and the other is oranges, is that what you are
18 saying?

19 THE WITNESS: They're not exclusively
20 apples and oranges, Your Honor. What I'm saying
21 to you is that in many instances, say in the
22 Type IV lands there's a physical reason that
23 these lands are not receiving full irrigation.

24 For example, a ditch system may be a foot or two
25 billstein-voir dire-white

1 above the elevation of a stream bank because
2 you had a flood or high water, made a downcut.
3 Therefore, for this particular season that we
4 did our field work, they only got partial service
5 water for that year. But with the proper
6 improvements, say you come in and put in a
7 diversion dam or you just use a tarp to check the
8 water, it may then be possible to bring this
9 tract of land back into a full service category,
10 a Type I or II. So what I don't want to do is
11 imply water duty relative to acres, relative to
12 my conclusions. That is for others to imply.

13 THE SPECIAL MASTER: I appreciate that
14 answer, and I think Mr. White does too.

15 MR. WHITE: I do, Your Honor, but at some
16 time somebody's going to have to explain what
17 the duty of water is for these lands and without
18 the foundation or the percentage of which type
19 they fall into, they're not going to be able to
20 do that.

21 THE SPECIAL MASTER: That fortunately is not
22 my problem.

23 MR. WHITE: Okay.

24 THE SPECIAL MASTER: It may be others problems --
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1 MR. WHITE: So why don't we put a bookmark
2 there and remember it when we get to that point.

3 Q (By Mr. White) Mr. Billstein, I hand you a
4 copy of pages 1, 2, 3, and 15 out of the Statement
5 of Claims in this action.

6 THE SPECIAL MASTER: How are you identifying
7 the document?

8 MR. WHITE: I'm not identifying it, it's just
9 a copy. I've given a copy to Counsel. It's a
10 Statement of Claim.

11 THE SPECIAL MASTER: You've reduced it down
12 actually in size.

13 Off the record, please.

14 (off-the-record discussion.)

15 THE SPECIAL MASTER: Okay, back on the
16 record. Mr. White.

17 Q (By Mr. White) Directing your attention to
18 Exhibit 137 and to the Statement of Claims, page 1,
19 can you tell the Court the number of acres on
20 Exhibit 137 which are included within the 11,230
21 acres of historic PIA for the Wind River on
22 the Statement of Claim?

23 A The Statement of Claims was based on earlier work,
24 some performed by HKM and some performed by the
25 billstein-voir dire-white

1 Bureau of Indian Affairs. That work has since
2 been modified to reflect the current conclusions
3 which are entirely HKM's. And I don't have a
4 tract by tract comparison of what the earlier
5 claims are versus what these claims are.

6 Q Can you tell us the number of acres from 137,
7 Exhibit C-137 which are included within the 5,042
8 acres for Dinwoody Creek?

9 A Same response.

10 Q How about for Bull Lake Creek, which has 29 acres?
11 Is it true for all of these that you cannot
12 correlate Exhibit 137 to the Statement of Claim?

13 A We're talking about use areas, the use areas
14 can be correlated, but in terms of an actual
15 tract by tract analysis, it was not important to
16 me that I do that. My job was to develop
17 conclusions based on the 1980 field season.
18 These conclusions are presented and it's referenced
19 to the earlier Statement of Claim, was not a
20 prerequisite that I make an analysis of that
21 relationship.

22 Q Are there any acres on Exhibit C-137 for Crooked
23 Trout Creek?

24 A Crooked Creek and Trout Creek have since been
25 billstein-voir dire-white

1 broken up into two separate use areas.

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1 A. (Continuing) They were combined for the Statement
2 of Claims, it appears.

3 Q. (By Mr. White) Well, I see 69 acres for Crooked
4 Creek and 228 acres for Trout Creek on 137; is that
5 correct?

6 A. That's right.

7 Q. In the Statement of Claims there's a total of 692
8 acres, is that correct, on Page 2?

9 A. Yes.

10 Q. Do the acres assigned to Crooked Creek and Trout
11 Creek on 137 fall within or without, or do you know,
12 the 692 acres on the Statement of Claims?

13 A. The acres in the Statement of Claims would have
14 reflected lands in current use as well as those
15 lands which were in idle status that were judged
16 to be irrigable at that particular point in time
17 in the study.

18 What I'm presenting here relative to my con-
19 clusions is land in current use outside of adjudi-
20 cated areas. And, naturally, there would be a dif-
21 ference between the two.

22 I would assume that most of these acres were
23 included in the initial Statement of Claims.

24 Q. I'd like you to assume that there are -- let's take
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1 a figure -- 2,000 -- you are not stuck with the
2 number -- but just assume that there are 2,000
3 acres of adjudicated current use or historic lands
4 within the Wind River portion of the Statement of
5 Claims.

6 How do you find out whether or not there are,
7 for purposes of the question, ninety-one hundred,
8 two hundred thirty acres in the Wind River on Exhi-
9 bit 137, or can you?

10 A. There is not a direct correlation. We are dealing
11 with tracts of land that were developed in two dif-
12 ferent time frames eighteen months apart.

13 MR. WHITE: Your Honor, the State of Wyoming
14 objects to Exhibit 55-B, 56 through 136, 137, and
15 I'll hold my objection because I have got some more
16 voir dire on 138, Your Honor, on the basis that at
17 best they can be described as illustrative with the
18 aerial photography and, most significantly, the
19 lands which Mr. Billstein has described in his own
20 words may or may not bear any relationship to the
21 acres claimed in the Statement of Claims.

22 It's the Statement of Claims that creates the
23 issues to be tried by this case; and if the Statement
24 of Claims is going to be amended at this late date

25 billstein - voir dire - white

1 to read in somewhat the same format as Exhibit 137,
2 the State of Wyoming certainly objects.

3 In general then, Your Honor, we object on the
4 basis of the general accuracy of the exhibits and,
5 most importantly, on the question of relevancy to
6 this adjudication.

7 This adjudication is for the purpose of adjudi-
8 cating the claims that are set out in Pages 1, 2, 3
9 and 15, among others, made by the United States, and
10 even their own witness cannot establish the correla-
11 tion between the values shown on Exhibit 137 and all
12 the related exhibits to the Statement of Claims that
13 this lawsuit is about.

14 And if it's different, we're entitled to know
15 it, and we are also entitled to a continuance to
16 make a thorough investigation of these claims as
17 opposed to the claims, the unamended claims, which
18 now exist. So our objection goes to relevancy and
19 accuracy, Your Honor.

20 THE SPECIAL MASTER: I would like very, very
21 much to sustain your objection to every one of these
22 exhibits, but if I did, I think I would be committing
23 an irrevocable, fatal error to whatever the report of
24 this hearing would be.

25 I believe it's sufficiently met the test to be

1 admitted -- you can flaunt me on it in good humor --
2 you are admitting it for whatever purpose it may
3 have.

4 It may be, indeed, filled with inaccuracies
5 which cripple its purpose. Some of these may be of
6 virtually little probative value, but if that's the
7 case that the United States wishes to present in
8 its role for the Tribes, I think it should be admit-
9 ted, although we will all have something further to
10 say about that further in the trial.

11 MR. WHITE: I would hope that -- I'm sorry,
12 Your Honor.

13 THE SPECIAL MASTER: With those observations
14 regarding these exhibits, I'm going to admit them
15 into evidence at this time.

16 MR. WHITE: Well, I think Mr. --

17 THE SPECIAL MASTER: Subject to further voir
18 dire of the exhibits. I thought you were working
19 together.

20 Mr. Cozzens, will you have additional voir
21 dire?

22 MR. COZZENS: I just have a few questions.

23 MR. WHITE: Before Mr. Cozzens steps up to
24 bat, I wonder if we could get a clarification about
25 the claims that the United States is adjudicating

1 in this case.

2 Are they the claims that are set out in part
3 on Exhibit 137, or are they the claims in the ori-
4 ginal Statement of Claims? And I think the State
5 of Wyoming is entitled to some sort of response on
6 that issue.

7 THE SPECIAL MASTER: Ms. Sleater, would you
8 like to address that inquiry?

9 MS. SLEATER: Yes, Your Honor.

10 THE SPECIAL MASTER: I had a suspicion you
11 did. If you would like to approach the podium --

12 MS. SLEATER: I would like to restate, and
13 we have restated in each week in the hearings and
14 which we initially stated last April, which is:
15 The work being done by the United States was not
16 completed at the time the Statement of Claims was
17 filed.

18 We tried to give a full and accurate statement
19 as of that time. We made mention to the Court on
20 March 15 and again on April 29 of the fact that
21 there would be further amendments as the studies
22 went on.

23 The State of Wyoming has been kept fully
24 abreast of this through extensive discovery, which
25 discovery was going on as late as this past Friday.

1 Now, some work is still ongoing, and I note
2 from communications with Mr. White that the State
3 has not yet finished their work either.

4 We are trying to the extent possible to make
5 Wyoming aware of our claims as they go on. The
6 claims by the United States on behalf of the
7 Shoshone and Arapahoe Tribes are the claims being
8 put forward in this action through the testimony
9 being presented.

10 It consists of numerous factors, undeveloped
11 lands, which have three basic components: the soils
12 component, as testified by Mr. Kersich; an engineer-
13 ing component; and an economic component.

14 The historic lands, which consist of the lands
15 that were subject to State adjudication as set forth
16 in my motion this morning, the lands in use as set
17 forth by Mr. Billstein, and lands which are idle,
18 are what are called Type 7 lands, which will be sub-
19 ject to further testimony by Mr. Waples and by Dr.
20 Mesghinna and by Mr. Dornbusch, who are engineers
21 and economists respectively.

22 The whole series of the claims, the fisheries
23 claims, all the claims for the Tribes are undergoing
24 constant review and analysis. We are doing our best
25 to make the State of Wyoming aware of this information

1 when we get it. There is nothing more we can do.

2 I feel that in a case of this magnitude where
3 it was clear at the time the statement was filed
4 that it was not the final word, that all that can
5 be done is to make the conclusions available when
6 they are made.

7 THE SPECIAL MASTER: I would like to use a
8 few minutes now for a general discussion that may
9 be, I hope, of some merit and value to all of us in
10 our work.

11 The Statement of Claims contains footnotes
12 that drew my attention at the time and have on
13 several instances in studying this since then.

14 The third page of the Statement of Claims
15 carries a footnote regarding the second column
16 which is the acre-feet totals that historic water
17 requirements consume the direct flow, hydrologic
18 potential of those creeks and that; therefore, a
19 claim is made for the noted water requirement or
20 for all of the direct flow of a creek, whichever
21 controls.

22 Doesn't that statement require far greater
23 demand for water than is either encompassed in the
24 Winters Doctrine or in the state appropriation or
25 any other facet that I know of? Wherein does the

1 law grant the obligation to dry up a stream in
2 order to give additional acreage for flow?

3 Now, I would like to have somebody address
4 that a little bit or give me the benefit -- maybe
5 we are six months ahead of ourselves, but that
6 isn't all the way out of the way either.

7 Yes, Mr. Rogers? Whoever drafted that I
8 would like to hear from.

9 MR. ROGERS: Well, I didn't draft that, so --

10 MS. SLEATER: I'm afraid I'm responsible for
11 the Statement of Claims, Your Honor.

12 That footnote relates to certain specific
13 creeks -- Milk Creek, Sage Creek, Willow Creek --
14 enumerated therein.

15 I might add that insofar as that footnote is
16 concerned, it may or may not --

17 THE SPECIAL MASTER: It applies to eleven
18 streams.

19 MS. SLEATER: There might be some modification
20 to the streams which are of concern. These are
21 basically intermittent or small flow streams on
22 the Reservation where there has been in the past
23 irrigation and to some extent -- I'm not a witness,
24 so I'm not going to tell you the extent right now --
25 ongoing irrigation to date.

1 What was meant by the footnote, if I can --
2 I was trying to -- to the extent that land was
3 being irrigated, we are claiming the land that
4 was being irrigated.

5 Now, if it so happens that in any given year
6 there's less water in the creek than the amount of
7 land that is normally irrigated, we were claiming
8 the amount of water it was necessary for the irriga-
9 tion up to the limits of the stream.

10 If there was less water there, obviously we
11 could not have full irrigation that year.

12 I should point out that for the legal basis
13 of this the Winters case itself was a case that
14 was dealing with the flow of the Milk River in Mon-
15 tana, and in that particular case, one of the origi-
16 nal findings of the Court, if you dig way, way back
17 into it, was that all the flow was set aside for the
18 Indians.

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1 THE SPECIAL MASTER: Yes, but the Indians
2 got half of what was requested in that, and I
3 raise that again, Mr. Rogers, because we crossed
4 this bridge about a year ago, and one of the
5 reasons for that was that there was not more
6 necessary, and in this particular footnote on
7 the streams, if the function of a fair and total
8 good life for the Tribes is the use of 12 or 1,500
9 acres on Muddy Creek and yet you show 3,630 acres
10 on it with 14,000 acre-feet per year, and that
11 stream can't possibly support it, there has to
12 be some application of equity there just as there
13 is on a stream where they allow an appropriation
14 to the downstream users, somebody's got to get
15 cut off.

16 MS. SLEATER: Your Honor, if I can address
17 this. In the Winters' Case I think a careful
18 reading of what went on at the lower court will
19 indicate the fact that the claim, while it was
20 originally for 10,000 acres, was in fact amended
21 and evidence was put on for 5,900 acres. Similar
22 to what is happening in this case, which was an
23 original statement was filed and now we've,
24 through additional study, there's some amendment

25 billstein-voir dire-white

1 necessary -- I don't want to mislead you to
2 thinking we've cut back on our claim here, but --

3 THE SPECIAL MASTER: Maybe it would be a
4 good idea to give some thought to cut back where
5 there is clearly equity, good management, land
6 management and maybe even conscience would justify
7 some cutbacks, they ought to be in order soon.

8 MS. SLEATER: When you hear the testimony
9 from our engineers who are going to be talking
10 about water duty, and from our final witness who
11 is in fact a water master in numerous irrigation
12 districts, you will see that the United States
13 has assessed numerous factors and only claiming
14 that amount of water that's necessary to irrigate
15 the land that is irrigable.

16 THE SPECIAL MASTER: Well, I hope you're
17 right. It wasn't so much this Statement of Claims
18 as it was the Indian claims that came in a month
19 or two after that really shook me because you
20 asked about twice this much, as I remember.

21 MR. ROGERS: Your Honor, we were in a
22 position at that time of not having a full study
23 done on everything that the Indians entitlement
24 warranted, and as a matter of fact, you can

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1 appreciate we are still in the midst of that
2 final preparation now, so to some extent the
3 claimed statements filed in 19 whatever they were,
4 '80, are being changed as a result of this work,
5 just as the government has said.

6 The alarm about the fact that some of the
7 Indian demands may in fact or some of their
8 rights under the Winters' Doctrine may dry up
9 streams, may or may not be a total picture on all
10 of these streams to which footnote 5 applied in
11 the Government's Statement of Claim, but it may
12 in fact turn out that some of them will be dried
13 up and, if in fact the Indians can show the
14 entitlement with irrigable acreage or otherwise
15 to that water with an 1868 priority date, then
16 under the law so it will have to be.

17 THE SPECIAL MASTER: I want you, Mr. Rogers --

18 MR. ROGERS: We could not know at this point --

19 THE SPECIAL MASTER: I'd like you, Mr.

20 Rogers, to start thinking about this as a point
21 to what you just said. If the evidence in this
22 case sustains a finding that the deep groundwaters,
23 not the Wind River alluvium, not the Wind River
24 aquifer of the alluvium, but the deeper aquifers

25 billstein-voir dire-white

1 carry with them the right unrestricted and
2 unrestrained of total usage to the Indians on
3 this entire Reservation, that somewhere in our
4 law of this land and in the history of the
5 Indian people themselves, there's an awful strong
6 morality that says you don't dry up a stream
7 on the surface when you can get the water from
8 it down below. You don't do this to the fish, to
9 the people, to the people downstream and to
10 yourselves. And if you have an unrestrained right
11 to all the deep water you want, you should be
12 perscribed or restrained or constrained from
13 drying up surface streams when there are other
14 sources of water.

15 MR. ROGERS: Your Honor, I don't think it's
16 the water law in Wyoming or any other western
17 state, however, that a senior user is required
18 to go to more expensive means of groundwater
19 irrigation or groundwater use in order to keep
20 junior users on surface streams.

21 THE SPECIAL MASTER: He may not have to if
22 he needs that. In this case he would not be
23 ordered to, I don't think, if he would need that
24 water for his livelihood or in some way, but where
25 billstein-voir dire-white

1 is the doctrine that says that you have the
2 absolute right to more water than is necessary
3 for a livelihood? Total usage of all the water
4 you want, you see, for irrigating even acreage
5 that has to have a proof that it's engineeringly
6 feasible, that it is economically feasible or
7 that it's necessary to your livelihood.

8 MR. ROGERS: Your Honor, there are a number
9 of points to respond to in your statement, I
10 hope I can remember all of them.

11 In the first place, the test of what the
12 Indian reserve water rights is is not what meets
13 their livelihood. The test is to -- sufficient
14 water was reserved to the Indian Reservation to
15 meet the purpose for which the Reservation was
16 established.

17 THE SPECIAL MASTER: Which was a success of
18 their livelihood in the arts of civilization.

19 MR. ROGERS: And that is not as the State
20 would have you necessarily restricted to the
21 barest means of subsistence and the most
22 fundamental irrigation and farming practice that
23 existed in 1868 or 1607 or whatever.

24 THE SPECIAL MASTER: I agree with you and --
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1 MR. ROGERS: Another point is that there is
2 no part or test yet recognized in law that I
3 am aware of, including the Arizona versus
4 California Decision, that requires any economic
5 feasibility test.

6 Now, we are going to be hearing some of that
7 evidence in this case, and one of the points of
8 departure between the Tribes and the United
9 States has to do with just that point, and how
10 much economic feasibility must be considered to
11 satisfy the legal test.

12 THE SPECIAL MASTER: If you ladies and
13 gentlemen would like a ruling on that, I'd be
14 glad to grant one. I might save you all a lot
15 of trouble.

16 MR. ROGERS: I think you should hear what
17 the evidence is. You've heard some argument
18 about it up to this point, but I think the Tribes
19 are prepared to present testimony from experts
20 about economic feasibility issues, and I think it
21 would be only appropriate to wait until that time
22 for any ruling on that question.

23 But basically the United States is proceeding
24 on an economic feasibility basis anyway, even for
25 billstein-voir dire-white

1 the claimed statement it has presented. So
2 you're going to get it in this case.

3 The Tribes' position will simply be that
4 that economic feasibility process used here is
5 too stringent. I think those are the main points
6 in your question, but we're not out to cut off
7 people, we're out to establish our rights which
8 the State forced upon us by this litigation, and
9 this is, as Your Honor has given some indication
10 without formally ruling on it, probably the only
11 day in Court we're going to get on what the
12 Indian right is. We have no choice therefore but
13 to go ahead and claim as much as foreseeable can
14 be claimed under what we read as the Winters'
15 Doctrine.

16 THE SPECIAL MASTER: All right. I want to
17 thank you all for giving me a chance to discuss
18 a little bit of this because I think it keeps us
19 in mind one of the goals, what this lawsuit is
20 really all about. Too, again a little consideration
21 of what we might think about that could possibly
22 bring us together on some basis of agreement
23 once in awhile and not have this head to head
24 dispute on every exhibit and title in this lawsuit

25 billstein-voir dire-white

1 that goes on week after week, month after month.
2 But we have done little agreeing lately un-
3 fortunately.

4 Go ahead, Mr. White.

5 MR. WHITE: Your Honor, I was going to
6 reserve my voir dire of 138, which is the report,
7 and let Mr. Cozzens conduct his voir dire on
8 the others.

9 THE SPECIAL MASTER: All right. I'll
10 withhold admitting them for both of you then
11 and you can continue with what you've got. You
12 want to go on to 138, a separate exhibit?

13 MR. WHITE: That's the report, Your Honor.

14 THE SPECIAL MASTER: All right, I see.

15 Mr. Cozzens, why don't you take and make --

16 MR. WHITE: Before Mr. Cozzens does that,
17 Your Honor, I would like to make a record on the
18 difference between Exhibit 137 and the Statement
19 of Claim, and simply would like to do that by
20 moving to strike -- I know what your ruling is
21 going to be -- moving to strike any evidence
22 which would be all the evidence induced by Mr.
23 Billstein because the United States has not been
24 able to tie his evidence, his conclusions into

25 billstein-voir dire-white

1 the Statement of Claim. The Statement of Claim
2 is what creates the issues that this lawsuit's
3 about, and it's a very late date to amend the
4 Statement of Claims. I assume the United States
5 must because there's no correlation between the
6 evidence and the Statement of Claim. If that is
7 in fact what the United States intends to do, I
8 will represent to the Court that the State of
9 Wyoming received the detailed information, which
10 is shown on the Exhibit 137 as well as all but
11 maybe ten of these other overlays, there were
12 about 70 of them, only last week. This lawsuit's
13 been going on for over four years, and the
14 Statement of Claims has been filed for -- filed for
15 almost a year. And the State would request an
16 extension for an amount of time required to
17 analyze the claims as represented by Mr. Billstein's
18 conclusions as they depart from the Statement of
19 Claim that we've been operating under for four
20 years.

21 THE SPECIAL MASTER: All right, Mr. White.
22 Why you're correct in your judgment on how I
23 will rule on this. Two, I will not grant an
24 extension to the State of Wyoming or to the United
25 billstein-voir dire-white

1 States or to the Tribes or to defendants or to
2 anybody else in this lawsuit from here on out.
3 We're on our way with it. I regret if you
4 don't have as much time as you'd like, but I've
5 seen some of these exhibits around the Federal
6 Courthouse for at least a month.

7 MR. WHITE: There is some dispute about when
8 they were delivered, Your Honor, but giving
9 everybody the benefit of the doubt, they were
10 delivered last month, that's 70 of the 80 of them.

11 MS. SLEATER: Your Honor, to clear up the
12 record, numerous of these exhibits I can't
13 represent that they were all there, but on
14 January 16th they were available in the Federal
15 Courthouse, and there were experts from the
16 State of Wyoming reviewing them then.

17 THE SPECIAL MASTER: I hold a continuing
18 hope that one of these hearings, one of these
19 days you two will be in agreement on one particular
20 matter when evidence comes in.

21 MR. WHITE: You'd like to take some evidence
22 on that, I'd be glad to put it on.

23 THE SPECIAL MASTER: I don't want to do that,
24 and I appreciate your feeling on it because
25 billstein-voir dire-white

1 there is a lot of material there, but my rulings
2 are made and I make them with a deep conviction
3 that they are the right decisions.

4 MR. WHITE: I hope you show the same usual
5 understanding when we take some time to go
6 through this.

7 THE SPECIAL MASTER: You remind me of that
8 when any further delay is requested.

9 MR. WHITE: We're going to have to go through
10 them in detail, Your Honor.

11 THE SPECIAL MASTER: I appreciate that, and
12 I've tried to be quite granting. I recognize
13 their importance and I'll give you all the time
14 you need. The one that probably can't understand
15 my patience is Mr. Millstein, he's probably
16 unhappy.

17 Okay, Mr. Cozzens.

18 VOIR DIRE EXAMINATION

19 BY MR. COZZENS:

20 Q Mr. Billstein, are you an expert on stereoscope
21 analysis?

22 A No, I'm not.

23 Q Have you ever done a significant number of
24 stereoscope analysis?

25 billstein-voir dire-cozzens

1 A I've used the stereoscope, but never carried
2 out a major portion of a project with it, in
3 that I have specialists under my supervision
4 that were hired to do that task.

5 Q Are you the one that hires those specialists?

6 A Yes.

7 Q Are you the one that determines their qualifications?

8 A That's about a right statement, yes.

9 Q What kind of controls or checks do you have to
10 determine if they're properly conducting the
11 stereoscope analysis?

12 A First of all, we've got good stereoscopic
13 equipment. It's a Letts moving tract stereoscope
14 with a three time magnifier. In terms of
15 equipment we have no problems.

16 In terms of the individual and their
17 expertise, as part of the interview we receive
18 references and check the references as to the
19 type of work that they've done before, and also
20 I use my limited experience in stereoscopic
21 work to ask the necessary questions. When I'm
22 satisfied that this individual understands and
23 can understand the program and can far exceed
24 my capabilities, then that's a prerequisite for
25 billstein-voir dire-cozzens

1 utilizing it.

2 Q Is it fair to say then that once you make your
3 own personal determination that whomever it is
4 that you've hired to do a stereoscope analysis
5 is qualified to do that, that you're basically
6 unable to follow up and make sure that he's not
7 making a mistake here and there?

8 A I can't say that I check every use area that he
9 evaluates. The reason that you hire specialists
10 is for speed and accuracy. Those of us who are,
11 don't utilize the stereoscope extensively in our
12 work program are awkwardly slow. You can utilize
13 the stereoscope and such as I have, and my
14 background in utilizing it, in working with some-
15 one like Mr. Saunders allows me to confirm that
16 he is carrying out the program properly.

17 Q Okay. Specifically then what did you do in that
18 preparation of these exhibits that confirmed in
19 your mind that Mr. Saunders had properly done
20 the stereoscope analysis?

21 A We took a look at the certain ditch systems, we
22 set up the photographs and tracked them. He
23 asked me to take a look at them, I reviewed some
24 of the ditch systems and we discussed what we saw
25 billstein-voir dire-cozzens

1 and the conclusions that he was making from
2 them.

3 Q But you did testify you're not an expert in that
4 area, so it's not -- you wouldn't necessarily
5 have picked up an error in his procedure; is
6 that correct?

7 A Not unless it was an obvious one.

8 Q And so basically what you're saying is the
9 stereoscope analysis that was done here, and to
10 the extent that it led to all of these exhibits,
11 was done by Mr. Saunders, and he's the one that
12 can speak to that?

13 A He's an expert in that field.

14 Q And you can't speak to that, is that fair?

15 A Only that I've got limited stereoscopic experience
16 and --

17 Q And you relied on Mr. Saunders?

18 A That's right.

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billstein-voir dire-cozzens

* * * * *

1 Q (By Mr. Cozzens) What precisely did your people
2 do when they went out and did the field studies?

3 A Okay. The day before the people broke out their
4 flight strips and went over the office analysis
5 or the stereoscopic analysis. They obtained a
6 familiarity with the systems that they were going
7 to evaluate the next day.

8 This is very critical so that when they are
9 out in the field, they do have an understanding of
10 the service concept and again how the use areas were
11 defined, less waste in the office.

12 Their first procedure when they entered the
13 field was to inspect the primary service facilities.
14 They are talking about the diversion works and the
15 major canal systems.

16 As we talked about before earlier in the testi-
17 mony, this was necessary so that they could evaluate
18 whether the ditch systems were, in fact -- whether
19 the diversions were operable; and once they had that
20 concept in mind, they could go back and take a look at
21 the land use and evaluate whether, in fact, that
22 physical system could have served that land use.

23 They reviewed the land use versus the boundaries
24 that were established in the office and confirmed,

25 billstein - voir dire - cozzens

1 verified or modified.

2 Q What types of evaluations did they have to make?

3 I mean, specifically they had to make some judg-
4 ments at some point, didn't they?

5 A That's correct.

6 Q And what types of judgments did they have to make?

7 A Basically, the service boundaries of the use areas.

8 Q And did you give them criteria to make those judg-
9 ments?

10 A They had the land use typing criteria plus they had
11 the criteria of relating the physical system itself
12 to the use area and make a determination if, in
13 fact, that physical system was, in fact, serving
14 that use area.

15 Q When you said the land use type, are we talking
16 about the exhibit where you went through six dif-
17 ferent land use classifications?

18 A That's right.

19 Q And you prepared that, is that correct?

20 A That was a set of data that was prepared primarily
21 for the hydrology studies that were going to be
22 undertaken.

23 It was necessary for us to have a concept on
24 the level of depletion associated with each tract

25 billstein - voir dire - cozzens

1 of land. The area that we're discussing now or
2 testifying to is basically a land base claim
3 delineation.

4 The reason that the typing was carried out
5 was to assist the hydrology study from the depletion
6 analysis standpoint.

7 Q I'll be honest with you and tell you I'm not sure
8 I understand your response. My question is: Did
9 you prepare these classifications?

10 A Okay. In response to the question, those land use
11 typings were prepared by a team, specifically Mr.
12 Waples, Mr. Toedter and myself.

13 Mr. Toedter was directly involved in the com-
14 pletion study, so he had the primary input.

15 I was just there to review the approach and
16 see if it was reasonable.

17 Q Are these classifications something that are new
18 to you in your field of expertise? Is this the
19 first time you have seen these classifications?

20 A No, they are classifications that were used pri-
21 marily in the SCS irrigated lands inventory work.
22 They are a common way of delineating lands so that
23 respective consumptive use and depletions can be
24 estimated, and these results are inputted into

25 billstein - voir dire - cozzens

1 hydrology studies so that you could get an accurate
2 representation of natural flows above and beyond
3 this level of depletion that we have identified.

4 Q Does your area of expertise then enable you to go
5 out to anybody's ranch and classify that ranch into
6 these different types of classifications?

7 A I'm familiar with the land use typings.

8 Q Is that part of your area of expertise? Are you
9 an expert in that area?

10 A I'm not an expert in that area.

11 Q Who is?

12 A Our water rights specialist and soils scientists
13 who have an agricultural background and have done
14 a lot of land use analyses would qualify, in my
15 opinion, as experts.

16 Q Specifically relating to the people who went out
17 and did the field studies that led to these exhi-
18 bits, would you identify the ones who are expert
19 in that area?

20 A All three of them would be qualified as experts,
21 in my opinion.

22 Mr. Saunders did that as part of the Powder
23 River Study for four years. He was responsible and
24 in charge for preparing the technical information

25 billstein - voir dire - cozzens

1 that was going into that adjudication.

2 Mr. Johnston was his party chief that per-
3 formed the field studies and made recommendations
4 on the claims, the same adjudication.

5 And Mr. Waples has had extensive experience
6 in irrigation typing and land use analysis.

7 Q So in this classification process we're really
8 doing the same thing that we did in the stereo-
9 scopic process, and what you are telling me is that
10 you hire people that you consider to be expert and
11 then you left it up to them; is that correct?

12 A A water resource planner --

13 Q Excuse me. Can you just answer the question? I
14 don't mean to cut you too short, but I think you
15 can answer this yes or no; and if it's no, we can
16 go further.

17 A I don't believe it's a yes-or-no question.

18 Q Is it correct that you don't have any expertise
19 in the area of classifying these lands to the dif-
20 ferent classes?

21 THE SPECIAL MASTER: Types or classes, because --

22 MR. COZZENS: Types.

23 THE SPECIAL MASTER: Classes 1, 2, 3, 4 and
24 types are a matter of --

25 billstein - voir dire - cozzens

1 MR. COZZENS: Let me make it clear.

2 Q (By Mr. Cozzens) I'm speaking about the types
3 that are set forth in what has been marked as
4 Exhibit HB-8, previously used here, and I believe
5 you told me that you weren't an expert and that
6 that wasn't part of your expertise?

7 A That's right.

8 Q And then you told me that the three people that
9 did that you considered to be experts?

10 A Yes.

11 Q And if you are not an expert, didn't you just have
12 to rely on their expertise?

13 A I have some experience in the area. A water resource
14 planner goes out and gets together an investigative
15 team of technical specialists. These people perform
16 certain tasks that are essential to the overall plan.

17 This is a standard approach for any water re-
18 source engineer. You do not have to do every single
19 technical item yourself. This is basically the pro-
20 cedure that I undertook.

21 I interviewed these people. I committed them
22 to tasks that I felt they were experts in and have
23 some experience in the area, and in my review process
24 feel comfortable with their results, and as a water

25 billstein - voir dire - cozzens

1 resource planner, I'm satisfied that I can make
2 the proper conclusions.
3 Q I'm not questioning whether you followed correct
4 procedure. My question is specifically: You had
5 to rely on their expertise in this area; is that
6 not correct?
7 A. That's correct.

18 * * * * *

1 Q The next step I believe you testified to was the same
2 three individuals then would discuss with various land-
3 owners; is that correct?

4 A There was an interview phase.

5 Q And was every landowner interviewed?

6 A Every landowner was contacted. Not every landowner was
7 interviewed.

8 Q Do you have an idea of how many, what percentage of the
9 landowners were interviewed?

10 A It would be less than half.

11 Q You testified previously on direct examination about at
12 least one instance where what the landowner told you and
13 what you personally observed in the field were not
14 the same thing.

15 Was that the only instance of that happening?

16 A There were numerous occasions during the interview phase
17 when the landowner would dictate to our field personnel
18 that such and such was the case. Before our people accepted
19 those conclusions, they were to do follow-up work.

20 The particular instance that I became involved in was
21 one that I caught, and it was an oversight in the follow-up
22 work from our field program.

23 Q You said that the interviewers were to do follow-up work.

24 Do you know firsthand whether they did?

25 billstein-voir dire-cozzens

1 A There were several occasions where I was involved in
2 discussions where we did not accept the interviewer's
3 recommendation.
4 Q I'm not real sure how you answered my question. Is the
5 answer then yes on these several occasions? There was
6 follow-up work done?
7 A To the best of my knowledge, they followed up in all cases.
8 Q Now, when you say, "To the best of your knowledge," does
9 that say to me that you are not aware that they could not
10 do that? Is that really what you are telling me?

11 THE SPECIAL MASTER: I think that's a little bit
12 argumentative. To the best of his knowledge and based on
13 his knowledge.

14 MR. COZZENS: I certainly wouldn't speak to the
15 Court about this objection, so maybe I will rephrase the
16 question.

17 THE SPECIAL MASTER: It is getting to be a late
18 hour and he's been through this for quite a while. It's
19 five o'clock. Will you be with us tomorrow?

20 MR. COZZENS: That would be fine.

21 THE SPECIAL MASTER: Why don't we do that? We
22 will stand in adjournment until 9:15 in the morning.

23 Yes, Regina?

24 MS. SLEATER: I just wanted to say one thing

25 billstein-voir dire-cozzens

1 for the record, which I think I had said for the record
2 before, and previously we advised the State of Wyoming,
3 but I wanted to make absolutely sure that this is on the
4 record, that the United States pursuant to an agreement
5 we have had with the Attorney General of the State of
6 Wyoming, reviews official filings of documents, whether
7 discovery documents or other documents, as filing with the
8 U. S. Attorney's Office in Cheyenne, to my attention, and
9 I just wanted to make the record absolutely clear on this,
10 that if documents and information are not received in this
11 office up here, it's not official filing on the United
12 States for purposes of this lawsuit.

13 THE SPECIAL MASTER: Okay.

14 MR. WHITE: Well, I suppose the record can speak
15 for itself, but I have got my curiosity up, Your Honor.
16 I'm kind of wondering what documents Ms. Sleater is worried
17 about.

18 THE SPECIAL MASTER: Why don't you two talk about
19 it after we adjourn?

20 MS. SLEATER: I just want to make sure that there
21 aren't any documents that I'm worried about.

22 MR. WHITE: Well, lots of people have entered their
23 appearance on behalf of the United States, and I suppose we
24 can serve any or all of those. We will make an attempt to
25 billstein-voir dire-cozzens

1 serve everybody we can.

2 THE SPECIAL MASTER: I appreciate that. I guess
3 what Ms. Sleater is saying is that, number one, it should
4 be to the United States of America, not to the tribes.

5 MS. SLEATER: Yes, this is for the United States.

6 THE SPECIAL MASTER: All right. We are in
7 adjournment until 9:15 in the morning.

8 (Thereupon the hearing recessed
9 at 5:03 p.m.)

10 * * * * *

INDEX TO EXAMINATION

RONALD BILLSTEIN

Direct Examination By Mr. Echohawk

Voir Dire Examination By Mr. White

Voir Dire Examination By Mr. Cozzens

Page
1905

1994

2068

INDEX TO EXHIBITS

Identified

1905

1939

1956

2041

2050

2002

2021

2022

2040

REPORTERS' CERTIFICATE

1
2
3 State of Wyoming)
4 : SS
5 County of Laramie)

6 We, Merissa Racine and Viola J. Lundberg, Registered
7 Professional Reporters and Notaries Public, hereby certify
8 that the facts as stated in the caption hereof are true;
9 that we did at the time, date and place, as set forth,
10 report the proceedings had before the Honorable Teno
11 Roncalio, Special Master Presiding, in stenotype; that
12 the foregoing pages, numbered 1883-2082, inclusive, con-
13 stitute a true, correct and complete transcript of our
14 stenographic notes as reduced to typewritten form under
15 our direction.

16 We further certify that we are not agents, attorneys
17 of counsel for any of the parties hereto, nor are we inter-
18 ested in the outcome thereof.

19 Dated this 9th day of March, 1981.

20 Merissa Racine
21 MERISSA RACINE
22 Registered Professional
23 Reporter

24 Viola J. Lundberg
25 VIOLA J. LUNDBERG
Registered Professional
Reporter

